

51779  
OFFICE OF THE  
CHIEF COUNSEL  
RULES DOCKET

1999 MAR -3 A 11: 22

Position of DEPARTMENT OF TRANSPORTATION  
JAPAN AIRLINES CO., LTD. 99 MAR -4 AM 11: 43  
regarding FAA NPRM on DOCKET SECTION  
SECURITY PROGRAMS OF FOREIGN AIR CARRIERS  
(Docket No. FAA-1998-4758)-12  
for presentation at  
FAA Public Meeting, February 24, 1999

----

Japan Airlines Co., Ltd. (JAL), through its attorney William Karas of **Steptoe & Johnson LLP**, appreciates the opportunity to present its views briefly on the referenced NPRM at this public meeting. As applicable to JAL flights from any one of the eight Japanese airports it utilizes on routes to the U.S.,<sup>1</sup> the rule would require JAL to adopt and comply with security measures dictated by the U.S. Government (**USG**) through the FAA; such security measures would have to be identical to the measures that the FAA requires U.S. carriers to adhere to when operating out of any such airport.

JAL believes that rules regarding the aviation security measures to be followed by airlines operating from a

---

<sup>1</sup> These airports are Narita, Kansai, Nagoya, Sendai, Fukuoka, Sapporo, Niigata and Hiroshima.

particular airport anywhere in the world can be validly promulgated in one of only three possible ways: (1) by the authorities of the nation in which the airport is located (the host state); (2) by the authorities of a particular carrier's homeland (the state of registry), but only with the acquiescence of the host state; or (3) by virtue of an agreement between or among nations. The rule proposed by the FAA, however, meets none of these three tests. Rather, the FAA is following a fourth way under which a state, being neither a host state nor a state of registry, would dictate aviation security rules not authorized by any international agreement.

### **Extraterritoriality**

JAL respectfully submits that it is a blatant violation of the territorial sovereignty of Japan for the USG to dictate security requirements for airports in Japan applicable to Japanese carrier flights to the U.S. Territorial sovereignty is a cornerstone of international law. One nation may not make rules applicable within the territory of another nation. The FAA cannot deny this most elementary principle of what it means to be a nation; and while the FAA purports to be respectful of the sovereignty of other nations (63 Fed. Reg. **64,766**), there is nothing to suggest that Japan has surrendered its sovereignty concerning aviation security procedures that take place on

Japanese soil. Here I should emphasize that the air services agreement between Japan and the U.S. does not address the subject of aviation security.

With the unfortunate exception of § 44906 of the Aviation Code of the United States (the so-called Hatch Amendment) underlying the FAA proposed rule, certain provisions of the Aviation Code recognize that the USG should not *unilaterally* make U.S. laws applicable in another nation's territory. For example, § 40120(b) establishes two criteria for the United States President to extend the application of Aviation Code provisions to places outside U.S. territory: an international arrangement must give the USG authority to make the extension *and* the President must decide that the extension is in the national interest. Both criteria must be met, but in this case neither has. In addition, § 44910 requires the Secretary of State to seek "multilateral and bilateral agreement on strengthening enforcement measures and standards for compliance related to . . . airport security," and is therefore antithetical to unilateral U.S. regulation of airport security outside the U.S.

#### **The Chicago Convention and Annex 17**

The Chicago Convention is the basic document governing the conduct of international civil aviation. Its purpose was,

and still is, to avoid chaos and confusion through **commonly-** agreed rules consistent with territorial sovereignty. The head of the U.S. delegation to the Chicago Conference, Adolph Berle, set forth the view of the United States: "**[W]ithout prejudice to full rights of sovereignty,** we should work upon the basis of exchange of needed privileges and permissions which friendly nations have a right to expect from each other." (Emphasis supplied).

The Convention addresses aviation security in detail in Annex 17. That document is absolutely clear that the host state is in charge of aviation security on its own soil. For example, Clause 3.1.18 states: "Each Contracting State shall require operators providing service **from t&at State** to implement a security programme appropriate to meet the requirements of the national civil aviation security programme of that State." In other words, the Government of Japan is the only nation empowered by the Convention to impose aviation security requirements on airlines departing from Japan.

The FAA's proposed rule obviously contravenes the host-state rationale of Annex 17, as well as the principle of territorial sovereignty announced in the very first article of the Convention. If each state of first arrival were to dictate security measures to be followed by JAL in its own country, not

only would the authority of Japan (the host state) be **completely** supplanted, but at its eight Japanese gateways **JAL** might have to comply with any number of different and perhaps inconsistent security programs, depending on the destination of each flight. Moreover, under the FAA's theory of jurisdiction, the Government of Japan would be able to dictate to United Airlines, for example, the security measures such airline would need to adopt at O'Hare for flights to Japan. The framers of the Convention would have been appalled by these possibilities.

### **Risk Assessment**

Aviation security is a very serious matter which JAL and its government take just as seriously as do U.S. airlines and their government. Appropriate and effective security measures should be discussed and developed in a cooperative framework outside any public forum, and should not be unilaterally declared by a non-host state in a legal proceeding outside the host state. Moreover, adequate security measures must be tailored to the risks involved for particular flights, depending on a variety of factors (particular destination, nature of passengers individually and collectively, nationality of carrier, etc.), as well as other information gathered by or filtered through the host state's intelligence apparatus.

The FAA's proposed requirement for foreign-airline security measures identical to U.S.-airline security measures is a very blunt instrument that does not take into account the nuances and changing character of aviation security risks for particular flights of particular carriers at particular airports. Consequently, the proposed rule's arbitrary and inflexible "identical" standard -- at least as it would apply in the various Japanese airports served by JAL on flights to the U.S. -- is highly inefficient for dealing with security risks in the manner envisaged by the Convention: that is, without loss of **"the advantage of speed inherent in air transport."**<sup>2</sup> Not surprisingly, such inefficiency will mean that Japanese carriers and Japanese airports will unnecessarily incur increased costs.

---

<sup>2</sup> In this regard, see clauses 2.2 and 3.2 **of** Annex 9 to the Convention (also attached to Annex 17), which provide in pertinent part that "Contracting States shall make provision whereby procedures for" the clearance of aircraft [clause 2.2] and clearance of persons travelling by air [clause 3.2], "including those normally applied for **aviation security** purposes . . . will be applied and carried out in such a manner as to retain **the advantage of speed inherent in air transport.**" See also clause 6.1 of Annex 9 (also attached to the aviation security annex, Annex 17) requiring Contracting States to "take all necessary steps to secure the co-operation of operators and airport administrations in ensuring that satisfactory facilities and services are provided for **rapid** handling and clearance of passengers, crew, baggage, cargo and mail at **their** international airports."

The only proper function of security rules is the adequate protection of aviation according to the risks involved; equalization of cost burdens is an improper purpose.

The proposed rule would also result in an increased cost burden on JAL operations **from** U.S. airports. By requiring foreign carriers to adhere to security measures identical to those required of U.S. carriers at U.S. airports, JAL would have to bear significantly greater costs for no valid **security-**related purpose. Again, cost equalization is not a valid concern for the FAA. To cite just one example: implementation of the proposed rule could possibly require JAL to have Ground Security Coordinators at each of its U.S. stations. That costly requirement would not yield a discernible measure of increased security. Besides, a requirement for Ground Security Coordinators at U.S. airports will be more costly to JAL than **to** its U.S. competitors since U.S.. airlines have very many more flights at U.S. gateways over which to spread the cost of Ground Security Coordinators.

It is **JAL's** view that to the extent there is any perceived shortcoming of security measures applicable to Japanese airlines at airports in Japan, the U.S., or anywhere else, that matter should be taken up with, and addressed at, the International Civil Aviation Organization (ICAO), which is the

internationally-designated body charged with the establishment of aviation security standards and recommendations. Indeed, Annex 17 is the product of ICAO discussions, deliberations and decisions. ICAO is the appropriate non-public vehicle for further discussions on aviation security, not an FAA rulemaking proceeding to adopt an unyielding "identical" standard without regard to risk assessment.

### **Conclusion**

From the dawn of aviation, the U.S. has been a leader in the formulation of the principles which govern and support the remarkably effective and harmonious global civil aviation regime. JAL urges the USG (including Congress and the FAA) to again demonstrate its leadership position by adhering to (a) the rule of law regarding territorial jurisdiction and (b) ICAO procedures for compliance with Annex 17 of the Chicago Convention.

Thank you for your attention.